

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

LOVELL THOMAS,

Defendant-Appellant.

UNPUBLISHED

November 30, 2010

No. 293888

Wayne Circuit Court

LC No. 09-003700-FC

Before: SERVITTO, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, and larceny from a person, MCL 750.357. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent 25 to 50 years' imprisonment for the robbery conviction, and five to ten years' imprisonment for the larceny conviction. He appeals as of right. We affirm.

I. BASIC FACTS

Defendant's convictions arise from two separate thefts at a 7-Eleven store in Taylor within a two-hour period on January 19, 2009. Beer was stolen during the first offense and cash was stolen during the second offense. Both offenses were captured by the store's security camera, and a video recording of the offenses was played for the jury. The same store clerk was working during both offenses and identified defendant as the perpetrator. Defendant was convicted of larceny for the offense involving the theft of the beer, and armed robbery for the offense involving the theft of the cash. The defense theory at trial was that even if the jury believed that defendant was the perpetrator, he was not armed during either offense.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was no credible evidence that he was armed with a weapon and, therefore, the evidence was insufficient to support his conviction for armed robbery in the offense involving the theft of the cash. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992),

amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong* (After Remand), 218 Mich App 325, 337; 553 NW2d 692 (1996).

The elements of armed robbery are (1) an assault, and (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a dangerous weapon or with an article used or fashioned in such a way as to lead a reasonable person to believe that it is a dangerous weapon. *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004); MCL 750.529. Here, defendant only challenges the third element, arguing that there was insufficient evidence that he was armed with a dangerous weapon. To establish the armed element, there must be "some objective evidence of the existence of a weapon or article." *People v Jolly*, 442 Mich 458, 468; 502 NW2d 177 (1993). "The existence of some object, whether actually seen or obscured by clothing or something such as a paper bag, is objective evidence that a defendant possesses a dangerous weapon or an article used or fashioned to look like one. Related threats, whether verbal or gesticulatory, further support the existence of a weapon or article." *Id.* at 469-470.

In this case, the victim testified that defendant approached her at the store counter, put his hand in his jacket pocket, and pointed a concealed article at her while demanding that she give him "the green" from the cash register. The victim believed that the concealed article was a gun and followed defendant's instructions because she believed that defendant would shoot her. Defendant's hand remained in his pocket pointing the concealed article at the victim during the entire episode. Viewed in a light most favorable to the prosecution, this evidence was sufficient to enable a rational jury to find beyond a reasonable doubt that defendant was armed with a gun or an article used or fashioned in such a way as to lead a reasonable person to believe that it was a gun to support his conviction of armed robbery. Although defendant argues that the victim's testimony was not credible, this Court will not interfere with the jury's role of determining issues of weight of the evidence and the credibility of the witnesses. *Wolfe*, 440 Mich at 514. Rather, this Court must draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Further, the jury had the benefit of viewing the store's security video recording of the incident from which it could draw its own conclusions about defendant's actions. There was sufficient evidence to sustain defendant's conviction of armed robbery.

III. CRUEL AND UNUSUAL PUNISHMENT

Defendant next argues that he is entitled to resentencing because his 25-year minimum sentence for armed robbery, despite being within the sentencing guidelines range, constitutes cruel and/or unusual punishment, contrary to US Const, Am VIII, and Const 1963, art 1, § 16. Defendant did not advance a claim below that a sentence within the sentencing guidelines range would nonetheless be constitutionally cruel or unusual. Therefore, this constitutional claim is not preserved. We review an unpreserved claim of constitutional error for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Defendant's sentence for his robbery conviction is within the sentencing guidelines range of 108 to 360 months. Although MCL 769.34(10) provides that a sentence within the guidelines range must be affirmed on appeal absent an error in the scoring of the guidelines or reliance on

inaccurate information in determining the sentence, neither of which is alleged to have occurred here, this limitation on review is not applicable to claims of constitutional error. *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). But a sentence within the guidelines range is presumptively proportionate, *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987), and a sentence that is proportionate is not cruel or unusual punishment, *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997). Here, defendant contends that his sentence is cruel or unusual because of his age (53 years at the time of sentencing). This factor is insufficient to overcome the presumptive proportionality of defendant's sentence, especially considering the substantial criminal record he has accumulated during his lifetime. Because defendant's sentence is proportionate, it is not cruel or unusual.

IV. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

A. SELF-REPRESENTATION

Defendant argues that the trial court erred by denying his request to represent himself at trial. We disagree. This Court reviews a trial court's factual findings regarding a defendant's request for self-representation for clear error, *People v Williams*, 470 Mich 634, 642; 683 NW2d 597 (2004), and reviews the ultimate decision regarding a defendant's request for self-representation for an abuse of discretion, *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003).

The right of self-representation is guaranteed by the Michigan Constitution and by statute, but is not absolute. *People v Anderson*, 398 Mich 361, 366-368; 247 NW2d 857 (1976); *Williams*, 470 Mich at 642. Before a defendant may represent himself, the court must determine that: (1) the defendant's request is unequivocal; (2) the defendant is asserting his right knowingly, intelligently, and voluntarily; and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court. *People v Russell*, 471 Mich 182, 190; 684 NW2d 745 (2004). In addition, pursuant to MCR 6.005, the trial court has a duty to inform the defendant of the charge and penalty he faces, advise him of the risks of self-representation, and offer him the opportunity to consult with retained or appointed counsel. MCR 6.005(D)(1). The trial court need only substantially comply with these requirements, and if the court is uncertain regarding whether any of the waiver procedures are met, it "should deny the defendant's request to proceed in propria persona, noting the reasons for the denial on the record." *Russell*, 471 Mich at 191 (citation omitted).

In this case, the trial court denied defendant's request for self-representation because it concluded that defendant would unduly disrupt the trial. The record discloses that defendant's request for self-representation was made at a pretrial hearing at which defendant continuously sought to challenge the accuracy of his prior criminal record. The trial court advised defendant that he would have an opportunity to challenge his prior convictions at an appropriate time, and directed the prosecutor to take necessary steps to address defendant's concerns. Despite the trial court's assurances that defendant's prior convictions would not be admitted at trial, defendant continued to revisit the issue and divert discussions to his prior record instead of focusing on the immediate issues of trial. Defendant's insistence on focusing on matters that were not relevant

for trial supports the trial court's finding that defendant would disrupt and unduly inconvenience the court if he represented himself at trial. Under these circumstances, the trial court did not err in denying defendant's request for self-representation.

B. JOINDER

Defendant also argues that the trial court erred when it denied his motion to sever the two offenses for trial. We disagree. A trial court's determination whether offenses are related and whether joinder of the offenses for trial is permissible under MCR 6.120(B) is reviewed de novo. *People v Abraham*, 256 Mich App 265, 271; 662 NW2d 836 (2003). The trial court's ultimate decision is reviewed for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997).

MCR 6.120(B) provides:

[T]he court may . . . sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.

(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

(a) the same conduct or transaction, or

(b) a series of connected acts, or

(c) a series of acts constituting parts of a single scheme or plan.

(2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

MCR 6.120(C) provides:

On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).

In this case, the evidence showed that both offenses occurred at the same location, were committed against the same store employee, and occurred on the same date, within a two-hour time period. The trial court did not err in finding that the offenses were "part of a single scheme or plan" to steal from the 7-Eleven store, and thus were related under MCR 6.120(B)(1)(c). Further, severance was not necessary to promote fairness to the parties and a fair determination of defendant's guilt or innocence. For each offense, defendant's primary defense was that he was not armed and that the victim was not credible. The two offenses were presented distinctively, and the facts were not complex. Accordingly, the trial court did not abuse its discretion in joining the offenses for trial.

C. 911 RECORDING

Defendant argues that he was denied his right to due process because the prosecutor failed to provide an audio recording of the 911 call that was made after the first offense, contrary to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). The record discloses that the trial court directed the prosecutor before trial to obtain the 911 recording if it still existed. The prosecutor later advised the trial court that he had contacted the police department, which indicated that it would attempt to provide the recording by the next week. No further mention of this matter was made before or at trial. Because there is no record that defendant raised this issue after the prosecutor was initially directed to provide the recording, we consider this issue unpreserved. Accordingly, our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 752-753, 763-764.

A criminal defendant has a due process right of access to certain information possessed by the prosecution if that evidence might lead a jury to entertain a reasonable doubt about a defendant's guilt. *People v Lester*, 232 Mich App 262, 280; 591 NW2d 267 (1998), citing *Brady*, 373 US 83. "Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence 'may make the difference between conviction and acquittal.'" *Lester*, 232 Mich App at 281 (citation omitted). To establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Id.* at 281-282.

In this case, there is no indication that the prosecutor either possessed or suppressed the recording of the 911 call of the first incident. More compelling, however, is that the lack of the 911 recording did not affect the outcome of the case. Defendant sought the recording for the purpose of showing that the victim did not state that he possessed a weapon during the first incident, thereby proving that he was not armed. The prosecutor conceded in closing argument that defendant was not armed during the first incident, and the jury convicted defendant of larceny from a person. To the extent that defendant sought to attack the victim's credibility in this regard, the responding police officer testified that he did not recall the victim mentioning that defendant was armed or that defendant had his hand in his pocket during the first offense. Consequently, defendant has failed to show a plain error affecting his substantial rights.

D. OPENING STATEMENT

Next, defendant argues that the trial court erred by allowing the prosecutor to play the recording of the 911 call made by the victim after the second offense during the prosecutor's opening statement. Defendant argues that this was improper because the recording had not yet been authenticated or admitted as evidence. We disagree.

A trial court's decision regarding what constitutes a fair and proper opening statement is reviewed for an abuse of discretion. See *People v Buck*, 197 Mich App 404, 413; 496 NW2d 321 (1992), rev'd in part on other grounds in *People v Holcomb*, 444 Mich 853; 508 NW2d 502 (1993). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). "The

purpose of an opening statement is to tell the jury what the advocate proposes to show.” *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). Here, the prosecutor’s use of the 911 call during opening statement was designed to show that he intended to prove that the victim stated that defendant was armed during the second incident. The trial court allowed the prosecutor to use the recording only after first addressing its admissibility and determining on the basis of the attorneys’ representations that it would be properly authenticated at trial. Indeed, the 911 recording was later admitted into evidence and played for the jury during the prosecutor’s presentation of proofs, without objection. The victim identified her voice and testified that the recording accurately depicted what she told the police. Under the circumstances, the trial court’s decision to allow the prosecutor to use the recording during opening statement, after first evaluating its admissibility, was a principled decision and, therefore, not an abuse of discretion.

E. ATTORNEY FEES

We disagree with defendant’s claim that the trial court erroneously ordered him to pay \$400 in attorney fees without inquiring into his ability to pay. Because defendant failed to challenge the imposition of attorney fees below, we review this unpreserved claim for plain error affecting his substantial rights. *Carines*, 460 Mich at 752-753, 763-764.

Previously, the rule in this context was that, before ordering an indigent defendant to reimburse the county for the cost of his or her court appointed attorney, the trial court was required to “provide some indication of consideration, such as . . . a statement that it considered the defendant’s ability to pay.” *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004). However, this rule from *Dunbar* was overruled in *People v Jackson*, 483 Mich 271, 275, 290; 769 NW2d 630 (2009), in which our Supreme Court held that “*Dunbar* was incorrect to the extent that it required a court to conduct an ability-to-pay analysis before imposing a fee for a court appointed attorney,” and that “*Dunbar*’s presentence ability-to-pay rule must yield to the Legislature’s contrary intent that no such analysis is required at sentencing.” The ability to pay assessment is only necessary when the “imposition is enforced and the defendant contests his ability to pay.” *Id.* at 298. Consequently, because an ability to pay analysis was not required before imposing attorney fees at sentencing and the imposition of the fees has yet to be enforced, defendant’s claim necessarily fails.

F. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that he was denied the effective assistance of counsel at trial. We disagree. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel’s performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel’s error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant argues that defense counsel was ineffective for failing to object to the joinder of the two armed robbery offenses. Contrary to what defendant argues, the record discloses that defense counsel did object to the joinder of the two offenses, but the trial court overruled counsel's objection. Further, as discussed in section III(B), *supra*, joinder of the offenses was appropriate under MCR 6.120(B)(1)(c). Thus, this ineffective assistance of counsel claim cannot succeed.

We also find no merit to defendant's claim that defense counsel was ineffective for failing to object to the imposition of attorney fees with no analysis of his ability to pay. As discussed in section III(E), *supra*, defendant relies on the former rule in *Dunbar*, 264 Mich App 240, which required an ability to pay analysis before the imposition of attorney fees. Under the current rule, however, any challenge to the imposition of attorney fees at sentencing based on an ability to pay would have been premature. *Jackson*, 483 Mich at 275, 290-292. Counsel was not required to make a futile request. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

G. SCORING OF OFFENSE VARIABLE 19

Defendant next argues that he is entitled to resentencing because the trial court erroneously scored ten points for offense variable (OV) 19 of the sentencing guidelines. We disagree. We review de novo "[t]he proper interpretation and application of the legislative sentencing guidelines." *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). We review a trial court's discretionary determination concerning the calculation of a sentencing guidelines variable score for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Ten points may be scored for OV 19 where "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." Here, the trial court scored ten points for OV 19 because defendant was untruthful about his prior record at sentencing. Even if it was improper to score OV 19 on the basis of defendant's conduct at sentencing, see *People v McGraw*, 484 Mich 120, 133, 135; 771 NW2d 655 (2009), resentencing is not required. If zero points were scored for OV 19, defendant's total OV score would decrease from 15 to 5 points. The scoring adjustment would not affect defendant's placement in OV level I (0 to 19 points), and his guidelines range would not change. MCL 777.62. Because any scoring error does not affect the appropriate guidelines range, defendant is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

H. ACCURACY OF THE PRESENTENCE REPORT

Defendant argues that his prior convictions were inaccurately listed in the presentence report and, as a result, he was not sentenced on the basis of accurate information. We disagree. We review a trial court's response to a claim of inaccuracies in the presentence report for an abuse of discretion. *People v Uphaus (On Remand)*, 278 Mich App 174, 181; 748 NW2d 899 (2008).

At sentencing, either party may challenge the accuracy or relevancy of any information contained in the presentence report. MCL 771.14(6); MCR 6.425(E)(1)(b); *People v Lloyd*, 284 Mich App 703, 705-706; 774 NW2d 347 (2009). If presented with a challenge to the factual

accuracy of information, a court has a duty to resolve the challenge. *Uphaus (On Remand)*, 278 Mich App at 182. The information in the report is presumed to be accurate, and the defendant has the burden of going forward with an effective challenge. *Lloyd*, 284 Mich App at 705. Once a defendant effectively challenges a factual assertion, the prosecutor has the burden of proving the fact by a preponderance of the evidence. *Id.* The court may adjourn sentencing to permit the parties to prepare for or respond to a challenge. *Id.* The court must allow the parties to be heard and must make a finding as to the challenge, or determine that a finding is unnecessary because the court will not consider it during sentencing. MCR 6.425(E)(2).

At sentencing, defendant challenged the accuracy of several of his prior convictions in the presentence report. The trial court questioned defendant at length to make a record of his challenges. The court then ordered the prosecutor to take the necessary steps to address defendant's claims of inaccuracy and to resolve the matter. When the proceedings resumed, the prosecutor submitted exhibits and reported his findings regarding the accuracy of the challenged convictions. Defendant was clearly afforded the opportunity to challenge the accuracy of the information in the presentence report. The trial court did not abuse its discretion in the manner in which it resolved defendant's challenges, nor did it err in concluding that the presentence report was accurate in light of the supporting evidence produced by the prosecutor.

Within this issue, defendant also argues that PRV 5 (prior misdemeanor convictions) was improperly scored at 20 points. Because defendant did not challenge the scoring of PRV 5 at sentencing or in an appropriate post-sentencing motion, this issue is not preserved and our review is limited to plain error affecting his substantial rights. *People v Kimble*, 470 Mich 305, 309-310; 684 NW2d 669 (2004). MCL 777.55(1)(a) states that 20 points are to be scored for PRV 5 if the offender has "7 or more prior misdemeanor convictions or prior misdemeanor juvenile adjudications." A conviction or adjudication is counted "only if it is an offense against a person or property, a controlled substance offense, or a weapon offense." MCL 777.55(2)(a). Defendant contends that although there are 21 prior misdemeanor convictions listed in his presentence report, nine of those convictions "do not fit the criteria set forth in MCL 777.55(2)(a)." Even accepting defendant's argument as correct, that still leaves more than seven misdemeanor convictions available to score PRV 5. Consequently, there was no plain error.

Affirmed.

/s/ Deborah A. Servitto
/s/ Brian K. Zahra
/s/ Pat M. Donofrio